

No. 09-35563

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

MARYGRACE A. CONEFF, *et al.*,
Plaintiffs – Appellees,

v.

AT&T CORP.,
Defendant,
and

NEW CINGULAR WIRELESS SERVICES INC, f/k/a AT&T Wireless Services,
Inc., et al.,
Defendants – Appellants.

Appeal from an Order of the United States District Court
for the Western District of Washington, No. 2:06-cv-00944-RSM

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
ARGUMENT	2
I. THE LAW OF PLAINTIFFS’ HOME STATES GOVERNS THE ENFORCEABILITY OF THEIR AGREEMENTS TO ARBITRATE.....	2
A. <i>Schnall</i> Disposes Of Plaintiffs’ Choice-of-Law Arguments	2
1. <i>Schnall</i> confirms that it would not violate any fundamental policy of Washington to allow other states to determine the enforceability of arbitration agreements entered into by their own citizens.....	6
2. <i>Schnall</i> confirms that the home states of the non-Washington plaintiffs have a greater interest in the enforceability of their citizens’ arbitration agreements than Washington does	7
B. Even If This Court Were Writing On A Clean Slate, Plaintiffs’ Approach To Choice Of Law Would Be Fundamentally Mistaken	9
1. Absent a choice-of-law provision, the law of the named plaintiffs’ home states would govern the enforceability of their respective arbitration agreements.....	9
2. Application of Washington law to the contracts of out-of-state customers would violate the Constitution	16
II. ATTM’S 2006 ARBITRATION PROVISION IS ENFORCEABLE UNDER WASHINGTON LAW	18
CONCLUSION	25

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Aceves v. Allstate Ins. Co.</i> , 68 F.3d 1160 (9th Cir. 1995)	11
<i>Allied-Bruce Terminix Cos. v. Dobson</i> , 513 U.S. 265 (1995)	23
<i>BMW of N. Am., Inc. v. Gore</i> , 517 U.S. 559 (1996).....	17
<i>Clark v. Martinez</i> , 543 U.S. 371 (2005)	17
<i>Cruz v. Cingular Wireless, LLC</i> , 2008 WL 4279690 (M.D. Fla. Sept. 15, 2008), <i>appeal pending</i> , No. 08-16080-C (11th Cir.).....	20
<i>Francis v. AT&T Mobility LLC</i> , 2009 WL 416063 (E.D. Mich. Feb. 18, 2009).....	21
<i>Healy v. Beer Inst., Inc.</i> , 491 U.S. 324 (1989).....	17
<i>Iberia Credit Bureau, Inc. v. Cingular Wireless LLC</i> , 379 F.3d 159 (5th Cir. 2004).....	24
<i>In re Detwiler</i> , 305 F. App'x 353 (9th Cir. 2008).....	14
<i>Kelley v. Microsoft Corp.</i> , 251 F.R.D. 544 (W.D. Wash. 2008)	10
<i>Laster v. AT&T Mobility LLC</i> , 584 F.3d 847 (9th Cir. 2009), <i>pet. for cert. filed</i> , No. 09-893 (U.S. Jan. 25, 2010).....	18, 19, 21
<i>Laster v. T-Mobile USA, Inc.</i> , 2008 WL 5216255 (S.D. Cal. Aug. 11, 2008), <i>aff'd sub nom. Laster v. AT&T Mobility LLC</i> , 584 F.3d 849 (9th Cir. 2009), <i>pet. for cert. filed</i> , No. 09-893 (U.S. Jan. 25, 2010).....	22
<i>Lowden v. T-Mobile USA, Inc.</i> , 512 F.3d 1213 (9th Cir.), <i>cert. denied</i> , 129 S. Ct. 45 (2008)	19
<i>Lozano v. AT&T Wireless Servs., Inc.</i> , 504 F.3d 718 (9th Cir. 2007)	10
<i>Masters v. DirecTV, Inc.</i> , 2009 WL 4885132 (9th Cir. Nov. 19, 2009)	8
<i>McKee v. AT&T Corp.</i> , 191 P.3d 845 (Wash. 2008)	<i>passim</i>

TABLE OF AUTHORITIES
(continued)

	Page(s)
<i>Pac. Employers Ins. Co. v. Indus. Accident Comm’n</i> , 306 U.S. 493 (1939).....	17
<i>Schnall v. AT&T Wireless Servs., Inc.</i> , __ P.3d __, 2010 WL 185943 (Jan. 21, 2010), <i>as amended</i> (Wash. Feb. 9, 2010).....	<i>passim</i>
<i>Scott v. Cingular Wireless LLC</i> , 161 P.3d 1000 (Wash. 2007)	18, 19, 23
<i>Torgerson v. One Lincoln Tower, LLC</i> , 210 P.3d 318 (Wash. 2009)...	20, 23, 24, 25
 Statutes and Rules	
9 U.S.C. § 2	24
Fed. R. Civ. P. 23(b)(3).....	5
Wash. Rev. Code § 62A.2-302.....	22
Wash. R. App. P. 13.7(a)	3
 Other Authorities	
RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971)	<i>passim</i>
LEA BRILMAYER, CONFLICT OF LAWS (2d ed. 1995)	15
RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS (5th ed. 2006).....	9

The choice-of-law issue that this appeal presents has become straightforward. That is because the Washington Supreme Court has rendered a controlling decision on the issue. *See Schnall v. AT&T Wireless Servs., Inc.*, ___ P.3d ___, 2010 WL 185943 (Jan. 21, 2010), *as amended* (Wash. Feb. 9, 2010). In *Schnall*, the court held that AWS’s choice-of-law clause, which selected the law of the state of each customer’s wireless phone area code, was fully enforceable and rejected the argument that Washington law should be applied to all members of a putative nationwide class because AWS was headquartered there. In so holding, the Washington Supreme Court confirmed that “Washington has *no interest* in seeing contracts executed by [AWS] representatives in other states with citizens of those states examined and adjudicated in Washington courts.” *Id.* at *7 (emphasis added). *Schnall* therefore makes clear that the district court erred in refusing to enforce the choice-of-law provisions of the non-Washington plaintiffs in this case.

Moreover, even as to the Washington plaintiffs, the district court’s judgment must be reversed because ATTM’s 2006 arbitration provision is fully enforceable under Washington law. As plaintiffs themselves concede, any customer who invokes ATTM’s dispute-resolution procedure is likely to obtain make-whole relief. As a consequence, ATTM’s arbitration provision does not prevent the plaintiffs from vindicating their own claims, and accordingly cannot be unconscionable under Washington law.

ARGUMENT

I. THE LAW OF PLAINTIFFS' HOME STATES GOVERNS THE ENFORCEABILITY OF THEIR AGREEMENTS TO ARBITRATE.

A. *Schnall* Disposes Of Plaintiffs' Choice-of-Law Arguments.

The Washington Supreme Court's recent decision in *Schnall* confirms that the district court erred in applying Washington law to the claims of the non-Washington plaintiffs, all of whom had entered into choice-of-law provisions that selected the law of their home states.

In *Schnall*, the plaintiffs alleged that AWS had misled a putative nationwide class of customers about a "Universal Connectivity Charge" fee, giving rise to a variety of contract and tort claims, including claims under Washington's Consumer Protection Act ("CPA"). 2010 WL 185943, at *1, *3. AWS opposed certification of a nationwide class on the ground that its choice-of-law clause—which selects the law of the customer's area code—prevented common issues from predominating over individual ones. Agreeing with AWS, the trial court refused to certify a class. The court of appeals reversed, ordering certification of a nationwide class. The Washington Supreme Court then granted AWS's petition for review.

In the Washington appellate courts, the plaintiffs contended that AWS's choice-of-law provision was unenforceable and that Washington law should apply to all AWS customers nationwide, which would eliminate some of AWS's

defenses and make the case manageable as a nationwide class action. For example, they argued that, because AWS’s arbitration provision was “unconscionable under Washington law,” there was “no reason [that AWS] should be able to enforce unconscionable provisions of its standardized form contracts against *anyone*, regardless of what other states’ laws may permit.” Appellants’ Opening Br. at 48, *Schnall v. AT&T Wireless Servs., Inc.*, __ P.3d __, 2010 WL 185943 (Wash. May 19, 2006) (No. 80572-5), *available at* 2006 WL 6286928 (emphasis in original).¹ They further asserted that if an arbitration clause that is unconscionable under Washington law “is enforceable under some other state’s laws, then to apply that state’s laws ... would violate the public policy of this state”—*i.e.*, Washington. Appellants’ Reply Br. and Resp. to Cross-Appeal at 35, *Schnall v. AT&T Wireless Servs., Inc.*, __ P.3d __, 2010 WL 185943 (Wash. Sept. 28, 2006) (No. 80572-5), *available at* 2006 WL 6286930.

The Washington Supreme Court rejected these arguments, holding that AWS’s choice-of-law clause is fully enforceable and that the necessity of applying the varying laws of the fifty states would make individualized issues predominate over common ones.

The court first noted that, under Washington law, choice-of-law clauses are

¹ Under Washington Rule of Appellate Procedure 13.7(a), the Washington Supreme Court resolves appeals from decisions of the Washington Court of Appeals on the basis of the briefs filed before the Court of Appeals and the documents submitted in connection with the petition for review.

presumed to be enforceable, and courts “generally enforce” them. *Schnall*, 2010 WL 185943, at *2 (quoting *McKee v. AT&T Corp.*, 191 P.3d 845, 851 (Wash. 2008)). The court then held that AWS’s choice-of-law clause is “conscionabl[e]” and enforceable under Section 187 of the *Restatement (Second) of Conflict of Laws* (1971). *Id.* at *3. The court explained that the plaintiffs could not satisfy Section 187’s test for voiding a choice-of-law provision because “[t]he choice of law provisions in this case were mostly based on customers’ area codes, not on forums having no substantial relationship to the parties or location of the transaction between them.” *Id.* The court acknowledged that AWS “is headquartered in Washington State,” but emphasized that “the customer’s area code is left to the discretion of the customer” and “often corresponds with the customer’s place of residence: in effect the *customer* selected which forum’s law would apply when he requested phone service from [AWS].” *Id.* (emphasis in original); *see also id.* (“the choice of forum is dictated by the consumer”). The court therefore found “no valid reason why we should now invalidate the choice of law clause each customer signed when he or she purchased wireless service from [AWS].” *Id.* Indeed, it endorsed the trial court’s view that the choice-of-law provision was affirmatively beneficial to consumers because it generally resulted in selection of “the law of the customer’s home state, thereby applying to that customer the law with which he or she is most familiar.” *Id.* (quoting trial court’s opinion).

Having determined that the trial court would be required to apply the law of

each class member's home state, the Washington Supreme Court found it obvious that individualized issues would swamp common ones. *Id.* at *4-*5. It explained that “[t]he choice-of-law provisions will do more than cause variations in damages”; they also would result in the outright elimination of the claims of many class members in states that recognize such affirmative defenses as “the voluntary payment doctrine.” *Id.* at *5-*6.

The court continued that “[e]ven if individualized issues did not predominate,” a nationwide class action would not meet the superiority requirement of Rule 23(b)(3) because “there is simply no efficiency in asking a trial judge to manage the laws of 50 different states as they apply to plaintiffs’ contract claims and the varied factual scenarios inherent therein.” *Id.* at *7. It added decisively that “Washington has *no interest* in seeing contracts executed by [AWS] representatives in other states with citizens of those states examined and adjudicated in Washington courts.” *Id.* (emphasis added).

Finally, the court rejected the argument that plaintiffs could pursue a nationwide class with respect to the Washington CPA claims, explaining that “nothing in our law indicates that CPA claims by nonresidents for acts occurring outside of Washington can be entertained under the statute.” *Id.* It squarely held that even when a “Washington business[]” is the defendant, “the legislature’s intent is to limit [the CPA’s] application to deceptive acts that affect the citizens and residents of Washington.” *Id.*

Given *Schnall*'s holding that AWS's choice-of-law clause—which is functionally identical to ATTM's—is fully enforceable (*id.* at *3), *Schnall* requires rejection of plaintiffs' choice-of-law arguments in this case. Indeed, *Schnall* firmly establishes that Washington has neither a fundamental public policy nor even a minimal interest in applying its law to determine whether the arbitration agreements of consumers from other states are enforceable.

1. ***Schnall* confirms that it would not violate any fundamental policy of Washington to allow other states to determine the enforceability of arbitration agreements entered into by their own citizens.**

Plaintiffs assert that Washington has a fundamental policy “against exculpatory class action bans” that extends to out-of-state customers of “Washington corporations” such as AWS. Pl. Br. 25-27. The Washington Supreme Court has now decisively rejected that argument, holding that “Washington has *no interest* in seeing contracts executed by [AWS] representatives in other states with citizens of those states examined and adjudicated in Washington courts.” *Schnall*, 2010 WL 185943, at *7 (emphasis added). And that is so even if the contractually chosen law “abrogate[s] [the defendant’s] liability”—*i.e.*, “exculpates” the defendant, to borrow plaintiffs’ parlance. *Id.* at *5. As the *Schnall* court put it, “Washington need *not* apply its Consumer Protection Act, *or its contract laws*, to the citizens of *other states* in order to protect the interests of the citizens of Washington.” *Id.* at *11 (emphases

added).

Schnall also rejects plaintiffs’ contention that Washington’s CPA creates a fundamental Washington policy of preventing allegedly “unfair trade practices” nationwide that “originat[e] from Washington businesses” (Pl. Br. 26-27 (emphasis and quotation marks omitted)). The *Schnall* court explained that “while it is true that Washington has a strong interest in regulating any behavior by Washington businesses which contravenes the CPA, the CPA indicates the legislature’s intent to limit its application to deceptive acts *that affect the citizens and residents of Washington.*” 2010 WL 185943, at *7 (emphasis added; internal quotation marks omitted). If non-Washington consumers cannot pursue a claim under the CPA at all, it follows that the CPA does not embody a “fundamental policy” against enforcement of arbitration agreements entered into by non-Washington consumers.²

2. *Schnall* confirms that the home states of the non-Washington plaintiffs have a greater interest in the enforceability of their citizens’ arbitration agreements than Washington does.

Schnall also dispatches plaintiffs’ argument that, under *Restatement* § 187, Washington has the requisite “materially greater interest” in the enforceability of the arbitration agreements of non-Washington consumers than do those consumers’

² Because *Schnall* is dispositive on this point, plaintiffs’ reliance on pre-*Schnall* cases (Pl. Br. 26-28)—all of which are distinguishable in any event (*see* Opening Br. 27-28, 32)—is unavailing.

home states. The *Schnall* court squarely held that “Washington has *no* interest” at all in having contracts between AWS and “citizens of [other] states examined and adjudicated in Washington courts.” 2010 WL 185943, at *7 (emphasis added).

Plaintiffs insist that their home states have “no interest” in regulating their contracts when application of Washington law would be more favorable to them than the law of their home states. Pl. Br. 30. Yet when the shoe is on the other foot, and the home states’ laws are more “protective of an injured plaintiff”—for example, with respect to recovery of punitive damages—plaintiffs say that the laws of those states should apply. *Id.* at 32 n.11. *Schnall* rejects this “defendants-always-lose” choice-of-law rule.³ In enforcing AWS’s choice-of-law clause even though doing so would defeat certification of a nationwide class and preclude customers who live in other states (including those with law more favorable to AWS) from pursuing their claims in Washington courts, the Washington Supreme Court made clear that other states have a perfectly legitimate interest in applying

³ In support of this one-way-ratchet approach to choice of law, plaintiffs cite an unpublished decision that refused to enforce the choice-of-law clause in contracts between a California company and its non-California customers. Pl. Br. 35 (citing *Masters v. DirecTV, Inc.*, 2009 WL 4885132 (9th Cir. Nov. 19, 2009)). But *Masters* applied California rather than Washington choice-of-law rules, making it inapposite here. Moreover, it was central to *Masters*’s holding that the plaintiffs in that case “assert[ed] claims under California law alone.” 2009 WL 4885132, at *1. By contrast, the non-Washington plaintiffs here assert claims under the laws of their home states. ER2176-81. And (unlike in *Masters*) *Schnall* forbids out-of-state plaintiffs from suing under Washington’s CPA.

their own law in disputes between their residents and out-of-state companies even when their law is “pro-defendant.”⁴

B. Even If This Court Were Writing On A Clean Slate, Plaintiffs’ Approach To Choice Of Law Would Be Fundamentally Mistaken.

As discussed above, *Schnall* drives a stake through the heart of plaintiffs’ arguments that Washington law applies to the unconscionability challenges of non-Washington customers. But even if *Schnall* had never been decided, Washington’s choice-of-law rules would require applying the law of plaintiffs’ home states when determining the enforceability of their arbitration agreements.

1. Absent a choice-of-law provision, the law of the named plaintiffs’ home states would govern the enforceability of their respective arbitration agreements.

To begin with, plaintiffs have placed the cart before the horse in assuming that *Washington’s* policies or interests are relevant to the choice of law for the non-Washington plaintiffs. Plaintiffs concede (Pl. Br. 36) that *Restatement* § 187(2) requires analysis of the public policy and interests of the state whose law would apply in the absence of a choice-of-law clause. As we explained in our opening brief (at 18-30), under *Restatement* § 188, the state in which each plaintiff resides is the state whose law would apply in the absence of a choice-of-law

⁴ If the rule were otherwise, choice-of-law principles would become meaningless. As a leading treatise admonishes, “state-interest analysis should not be a subterfuge for ‘the plaintiff wins’ or ‘apply the law of the forum.’” RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS § 6.29 (5th ed. 2006).

provision. Thus, Washington’s interests fall out of the picture at this threshold stage of the choice-of-law inquiry.⁵

Plaintiffs barely attempt to defend the district court’s holding that, because at least one named plaintiff resides in Washington, Washington may be treated as the state whose law would apply to *all* plaintiffs in the absence of a choice-of-law provision. All they can muster is the irrelevant observation that the Court “‘need not examine the law of all jurisdictions so long as actual conflict exists between Washington law and the law of one other concerned state.’” Pl. Br. 47 (quoting *Kelley v. Microsoft Corp.*, 251 F.R.D. 544, 551 (W.D. Wash. 2008)). But the quoted passage from *Kelley* addresses whether there is a true conflict and hence whether the court needs to examine choice of law *at all*—not how the choice-of-law analysis should proceed in the event that there is a true conflict. Here, there is no question that the relevant states analyze unconscionability differently—a principle that this Court has expressly recognized. See *Lozano v. AT&T Wireless Servs., Inc.*, 504 F.3d 718, 728 (9th Cir. 2007). Accordingly, under *Restatement* § 187, the district court was required to determine which state’s law would apply to *each* plaintiff’s unconscionability challenge in the absence of a choice-of-law provision. Opening Br. 16-17 & n.11.

⁵ In *Schnall*, the Washington Supreme Court omitted this step of the analysis, instead simply holding that the choice-of-law clauses of the non-Washington plaintiffs were fully enforceable under *Restatement* § 187.

Plaintiffs next suggest that their case presents such a “unique type of contract issue”—an unconscionability challenge to an agreement to arbitrate on an individual basis—that the district court was free to depart from *Restatement* § 188. Pl. Br. 44 (asserting that “it was proper for the district court to consider the place of the alleged conduct—even though that factor also relates to choice-of-law issues involving torts”). That argument cannot be squared with *McKee*. That case involved an appeal from an order denying a “motion to compel arbitration” because “the provisions prohibiting class actions” in the form consumer contract were alleged to be “substantively unconscionable.” 191 P.3d at 850. The Washington Supreme Court made clear that the “question of which state’s law should apply” is governed by the test from the “*Restatement* § 188.” *Id.* at 851. To implement that test, Washington courts “weigh the relative importance to the particular issue of (a) the place of contracting, (b) the place of negotiation of the contract, (c) the place of performance of the contract, (d) the location of the subject matter of the contract, and (e) the domicile, residence, or place of incorporation of the parties.” *Id.* at 852. Because the federal courts are “bound to follow the holdings of the [state] Supreme Court when applying [state] law” (*Aceves v. Allstate Ins. Co.*, 68 F.3d 1160, 1164 (9th Cir. 1995)), this Court must reject plaintiffs’ argument that the *Restatement* § 188 factors can be “properly disregarded” or are of “dubious” relevance. Pl. Br. 38. Plaintiffs—like the district court—must take Washington choice-of-law doctrine as they find it, not as they

would like it to be. Even if plaintiffs were correct that the *Restatement* § 188 factors have “outlasted any usefulness” (*id.*)—and the 2008 *McKee* decision proves otherwise—that is a judgment that only the Washington Supreme Court can make.

For the reasons we discussed in our opening brief (at 22-27), the *Restatement* § 188 factors overwhelmingly favor applying the laws of the states in which the non-Washington plaintiffs reside. Plaintiffs ignore our arguments, merely asserting—without elaboration—that there is *no* place of contracting, negotiation, or performance, and no place where the subject matter of the contract is located. Pl. Br. 37. Yet case after case, as well as common sense, indicate that form contracts for wireless services are agreed upon, performed, and situated *where the consumer lives and bought his or her phone*. Opening Br. 22 n.14 (collecting cases); *see also Schnall*, 2010 WL 185943, at *2-*3 (“location of the contractual relationship” is the place where each customer “signed [the agreements] when he or she purchased wireless service from [AWS]”).

Plaintiffs next contend that the domicile of the parties favors Washington rather than the plaintiffs’ home states, focusing only on the fact that AWS was incorporated there.⁶ Pl. Br. 38. But every contract has (at least) two parties.

⁶ If the headquarters of the defendant were all that mattered, that still would not justify application of Washington law. ATTM, the successor-in-interest to AWS, and the company that promulgated the applicable arbitration provision, is a Delaware corporation with its principal place of business in Georgia. ER7; Opening Br. 5, 26, 29-30. Thus, if plaintiffs’ “state of corporate headquarters

Plaintiffs would have this Court ignore where *they themselves live*. That approach cannot be squared with the *Restatement*, which indicates that plaintiffs' home states have the predominant interest: When the issue is a "contract rule designed to protect [a] party against the unfair use of superior bargaining power," such as unconscionability, the "state *where [that] party is domiciled* has an obvious interest in" applying its law. RESTATEMENT § 188, cmt. c (emphasis added).

Moreover, plaintiffs articulate no reason why applying Washington law to arbitration agreements in other states would protect the "justified expectations" of consumers in those states. RESTATEMENT § 188, cmt. b. Consumers would reasonably expect that the law governing their contract would be that of their home state—where they signed up for and predominantly received service, and from

trumps all" theory were correct, it would require applying *Georgia* law, not Washington law. Opening Br. 25, 29-30. Plaintiffs imply that we are estopped from making this argument because we successfully opposed discovery on AWS's and ATTM's contacts with Washington after the merger. Pl. Br. 45-46. But we did so on the ground that *Restatement* §§ 187 and 188 rendered defendants' contacts with Washington irrelevant (SER14-15)—a proposition that the district court accepted in granting the motion for a protective order before changing its mind when it denied arbitration. As for plaintiffs' assertion that they submitted evidence that AWS "drafted the arbitration clause at issue here ... in Washington" (Pl. Br. 45), the premise is wrong. As the district court found (and plaintiffs do not contest), the applicable arbitration clause is the one that was promulgated by ATTM in 2006, after the merger with AWS. ATTM (formerly Cingular) is and always has been headquartered in Georgia, and decisions relating to the 2006 arbitration provision took place there, not in Washington. ER2166-67; Reply in Supp. of Defs.' Am. Mot. to Compel Arbitration (Dkt. #181) 2-3.

where they paid their bills. As this Court has noted, it is when businesses frustrate this expectation with “choice-of-law provisions selecting other states” rather than “the law of the state in which the consumer resides” that courts typically “invalidate[]” the provisions. *In re Detwiler*, 305 F. App’x 353, 356 (9th Cir. 2008); *see also Schnall*, 2010 WL 185943, at *3 (agreeing with trial court’s conclusion that “[t]he law of the State associated with the area code will generally be the law of the customer’s home state, thereby applying to that customer the law with which he or she is most familiar”). Consumers would have little reason to think that the governing law would be that of the place where their vendor was located at the time they signed their agreement. Indeed, most customers neither know nor care where their vendors are headquartered.

Because *Restatement* § 188 is such hostile terrain for plaintiffs’ choice-of-law arguments, they change the topic and instead contend that we advocate a “mechanical” approach to choice of law that involves “counting the contacts.” Pl. Br. 36, 38. Call it what they will, that is the methodology dictated by the Washington Supreme Court. *See McKee*, 191 P.3d at 850-51. Plaintiffs say that, because this case involves “nationwide policies,” “standard form contracts,” and allegations that the arbitration provision has an “immuniz[ing]” effect (Pl. Br. 38, 44), the Court should decline to apply *McKee* (and *Restatement* § 188). But *McKee* also involved nationwide policies, standard form contracts, and allegations that the arbitration provision had an immunizing effect. *See* 191 P.3d at 851, 857-

58. And the Washington Supreme Court nonetheless held that the defendant's state of incorporation was insufficient to overcome the other *Restatement* § 188 factors. The same analysis applies here.

Plaintiffs next defend the district court's employment of the factors relevant to choice of law for tort questions, such as the place where the underlying alleged misconduct occurred. Pl. Br. 40-45. But the question here is which state's law applies to plaintiffs' effort to avoid their arbitration agreements by invoking the *contract* defense of unconscionability. A separate choice-of-law analysis would govern the underlying CPA and tort claims. Indeed, in *McKee* the underlying claims were CPA and tort claims. *See* 191 P.3d at 848-49. But in determining which state's law governed the plaintiff's unconscionability challenge, the Washington Supreme Court considered the factors in *Restatement* § 188—and § 188 alone.⁷ Thus, the tort cases that the district court, plaintiffs, and plaintiffs' amicus have cited (*see* ER7; Pl. Br. 27-28, 30-33, 40-42; NACA Br. 3-17) are irrelevant, and their reliance on the tort choice-of-law factors contained in

⁷ For this reason, plaintiffs' attempt to use *Restatement* § 6 to justify a more free-ranging choice-of-law inquiry than that dictated in *McKee* (*see* Pl. Br. 37) misfires as well. Moreover, *Restatement* § 6 describes the "most significant relationship" test at the most general level. That section "need rarely be relied on directly" when another *Restatement* rule—here, Section 188—"applies to the particular situation before the court." LEA BRILMAYER, *CONFLICT OF LAWS* § 2.2.3 (2d ed. 1995).

Restatement § 145 is directly contrary to *McKee*.⁸

2. Application of Washington law to the contracts of out-of-state customers would violate the Constitution.

Finally, plaintiffs' approach to choice of law raises serious constitutional questions. As noted above, *Schnall* rejects plaintiffs' assertion that their home states have "no 'legitimate interest'" (Pl. Br. 32) in upholding arbitration agreements entered into within *their* borders by *their* residents. See pages 7-9, *supra*. But even if *Schnall* had never been decided, the doctrine of constitutional avoidance would powerfully militate against applying Washington law to the claims of out-of-state plaintiffs. See Opening Br. 33-35.

Plaintiffs insist that our federalism argument is a "red herring." Pl. Br. 47-48. But they do not dispute that their arguments would transform Washington unconscionability law into a nationwide standard for all Washington companies. The upshot of their arguments is to cast aside the differing policy judgments that the other states have made concerning their own citizens' contracts for dispute resolution. If their approach to choice of law were adopted, Washington-based businesses (as well as their out-of-state successors) would have to assume that they

⁸ Indeed, plaintiffs' strategy of cloaking issues of contract validity in the language of tort would render contractual choice-of-law principles superfluous because it would always be possible to re-characterize the selection of the law of a state with less plaintiff-friendly contract law as a "tortious" attempt to avoid liability, thus bringing the tort choice-of-law principles into play. The question here is which state's law governs plaintiffs' unconscionability attacks on their arbitration agreements, not the choice of law for plaintiffs' underlying tort claims.

would always be subject to nationwide class actions under Washington law, which necessarily would change the way they do business in every other state.

Although there is no “doubt that Congress has ample authority to enact” nationwide consumer-protection standards, it is equally “clear that no single State could do so” consistent with the Due Process Clause. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 571 (1996). By disregarding the policy judgments of other states, plaintiffs’ position also implicates the Full Faith and Credit Clause, which forbids “one state to legislate for the other or to project its laws across state lines so as to preclude the other from prescribing for itself the legal consequences of acts within it.” *Pac. Employers Ins. Co. v. Indus. Accident Comm’n*, 306 U.S. 493, 504-05 (1939). Plaintiffs’ position also raises serious questions under the Commerce Clause, which “protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State.” *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336-37 (1989). Because plaintiffs’ approach to choice of law “would raise a multitude of constitutional problems,” it should be rejected. *Clark v. Martinez*, 543 U.S. 371, 380-81 (2005).

* * *

In sum, it was clear even before *Schnall* that the district court erred in refusing to honor the choice-of-law provisions in the agreements of the non-Washington plaintiffs. After *Schnall*, any residual doubt on that score has been eliminated. This Court accordingly must reverse the order of the district court and

instruct the court to apply the law of each plaintiff's home state to his or her unconscionability attack on ATTM's arbitration provision.

II. ATTM'S 2006 ARBITRATION PROVISION IS ENFORCEABLE UNDER WASHINGTON LAW.

We do not deny that Washington law applies to the unconscionability challenges of three of the named plaintiffs (Amy Frerker and Steven and S. Leonard Shulman), as those plaintiffs (unlike the other 14) are from Washington. But the district court erred in holding that ATTM's 2006 arbitration provision is substantively unconscionable under Washington law. Plaintiffs' effort to defend that ruling is mistaken on multiple counts.

First, plaintiffs misstate the holding in *Scott v. Cingular Wireless*, 161 P.3d 1000 (Wash. 2007). They say that, under *Scott*, agreements to arbitrate on an individual basis are unenforceable under Washington law whenever not all allegedly affected consumers might "seek redress," because in that circumstance enforcing such agreements would allow "the alleged misconduct to continue on a widespread basis." Pl. Br. 50. But requiring proof that *every* customer would pursue a claim amounts to an across-the-board prohibition. True, this Court has effectively found that California has adopted such an across-the-board rule. *See Laster v. AT&T Mobility LLC*, 584 F.3d 849, 856 & n.9 (9th Cir. 2009), *pet. for cert. filed*, No. 09-893 (U.S. Jan. 25, 2010). But that is *not* the law in Washington: In *Scott*, the Washington Supreme Court disavowed a blanket rule, emphasizing

that it could “certainly conceive of situations where a class action waiver would not prevent *a consumer* from vindicating *his or her* substantive rights” and “would thus be enforceable.” 161 P.3d at 1009 n.7 (emphases added); *see also McKee*, 191 P.3d at 852 (“We have held that some class action prohibitions may be conscionable.”).⁹ ATTM’s 2006 provision passes muster under *Scott*, which by its terms focuses on the effect of an arbitration provision on the named plaintiff(s) before the court rather than all putative class members. This Court already has concluded that ATTM’s provision “essentially guarantee[s] that the company will make any aggrieved customer whole who files a claim.” *Laster*, 584 F.3d at 856 n.9.

Second, plaintiffs simply assume—contrary to the evidence—that class actions provide greater relief to customers than ATTM’s provision. Plaintiffs never rebutted our showing below that, in the typical consumer class action, only a

⁹ Plaintiffs argue that California and Washington unconscionability law are identical, pointing to this Court’s statement that “the Washington State Supreme Court grounded its unconscionability determination in *Scott* in concerns almost identical to those underpinning California’s unconscionability determination in *Discover Bank [v. Superior Court]*, 113 P.3d 1100 (Cal. 2005).” *Lowden v. T-Mobile USA, Inc.*, 512 F.3d 1213, 1221 (9th Cir.) (quoted at Pl. Br. 59), *cert. denied*, 129 S. Ct. 45 (2008). But to say that the concerns are the same is not to say that the ensuing rules are the same. In any event, *Lowden* involved an arbitration provision that made individual arbitration of small claims infeasible by barring recovery of attorneys’ fees. *See id.* at 1222-23. The *Lowden* Court had no occasion to decide the question here—whether an agreement that “essentially guarantees” that customers who invoke arbitration would be made “whole” (*Laster*, 584 F.3d at 856 n.9)—is unconscionable under Washington law.

tiny percentage of class members submit claims, and those that do typically receive only pennies on the dollar. Opening Br. 50-52. Sometimes, no class members benefit at all. *Id.* at 52. Plaintiffs do not explain why ATTM’s provision—under which any consumer who complains likely will receive make-whole relief without the need for arbitration—provides consumers with inferior relief compared to class actions—much less to such an extent that it “shock[s] ... the conscience.” *Torgerson v. One Lincoln Tower, LLC*, 210 P.3d 318, 323 (Wash. 2009) (describing Washington’s test for unconscionability).¹⁰

Third, in asserting that they cannot feasibly arbitrate even their own claims, plaintiffs (and the lawyers whose affidavits they submitted) assume that the “costs and legal and factual challenges raised by the[ir] claims” would be the same in individual *arbitration* as in class-action *litigation*. Pl. Br. 52-54 & n.18. But those two methods of dispute resolution differ dramatically. No doubt aware that it would be impossible to manage a trial in which millions of class members each were required to prove individualized claims of inadequate call quality, plaintiffs

¹⁰ Plaintiffs do point out that a class notice might alert some customers to the existence of a claim. Pl. Br. 55. But plaintiffs’ own data show that their advocacy group received over 1,800 complaints in the first 24 hours after it issued a press release about this case. *Id.* at 18 (citing ER602). Thus, even without a class notice, plaintiffs’ lawyers had little difficulty getting the word out. *See also, e.g., Cruz v. Cingular Wireless, LLC*, 2008 WL 4279690, at *4 (M.D. Fla. Sept. 15, 2008) (the ability of customers who prevail in arbitration to “disseminat[e] the information in the manner of their choosing” would rapidly bring to an end any “alleged illegal practices”), *appeal pending*, No. 08-16080-C (11th Cir.).

argue that they would be required to retain expert witnesses to attempt to persuade the district court (and subsequently a jury) that ATTM deliberately degraded the network. No doubt, that would be a time-consuming, expensive, and ultimately still unmanageable process. By contrast, individual arbitration is informal and eliminates the procedural and evidentiary hurdles that plaintiffs would need to overcome in order to obtain class certification and then prevail on the merits in court. Opening Br. 42-45. Plaintiffs offer no reason why, in an informal individual arbitration, their claims could not be resolved based on their bills, a map of the neighborhood in which they use their phone, and their testimony about the call quality problems they allege. *Cf. Francis v. AT&T Mobility LLC*, 2009 WL 416063, at *8 (E.D. Mich. Feb. 18, 2009). The notion that they would need to submit the kind of expensive expert testimony that their counsel are accustomed to using in class-certification battles is baseless.¹¹

In fact, plaintiffs do not explain why they would need to arbitrate at all. As plaintiffs themselves point out—and as found by both the court below (ER18) and this Court in *Laster* (584 F.3d at 856 n.9)—ATTM has an overwhelming incentive

¹¹ In concluding that lawyers would not agree to represent customers in individual arbitration, plaintiffs' experts also failed to understand basic principles that govern statutory awards of attorneys' fees or the double-lodestar amount that is potentially available under ATTM's provision. Plaintiffs do not respond to our showing that such awards are not reduced merely because the lodestar might exceed the customers' claim (Opening Br. 47 & n.27), as their experts assumed (ER17).

to offer customers make-whole relief in order to avoid the risk of having to pay the higher premiums (on top of the full cost of the arbitration).¹² At times (*see, e.g.*, Pl. Br. 53-54), plaintiffs appear to forget this concession and suggest that they could not arbitrate their own claims. But they cannot have it both ways. If, as plaintiffs say, ATTM would pay them the amount of their claims before arbitration begins in order to avoid the risk of having to pay the premiums, then they are guaranteed full relief. If not, plaintiffs with meritorious claims can recover those substantial premiums—including \$5,000, double attorneys’ fees, and full reimbursement for the costs of any experts—thus making individual arbitration feasible for them. Either way, plaintiffs have full relief or a more-than-fair shot at recovering substantially more than full redress for their alleged damages.

Fourth, plaintiffs overlook that Washington unconscionability doctrine requires evaluation of the bargain *ex ante*, not *ex post*. *See* Wash. Rev. Code § 62A.2-302 (“[T]he court may refuse to enforce the contract” if “the court finds as a matter of law the contract or any clause of the contract to have been

¹² For that reason, plaintiffs’ observation that relatively few ATTM customers have arbitrated claims (Pl. Br. 17, 53) is hardly evidence that individual arbitration is infeasible. To the contrary, it shows that customers do not need to escalate disputes to that level in order to obtain redress. *See Laster v. T-Mobile USA, Inc.*, 2008 WL 5216255, at *11 (S.D. Cal. Aug. 11, 2008) (ATTM’s dispute-resolution “process is quick, easy to use, and prompts full or, as described by Plaintiffs, even excess payment to the customer *without* the need to arbitrate or litigate.”) (emphasis in original), *aff’d sub nom. Laster v. AT&T Mobility LLC*, 584 F.3d 849 (9th Cir. 2009), *pet. for cert. filed*, No. 09-893 (U.S. Jan. 25, 2010).

unconscionable at the time it was made.”). At the time of contracting, reasonable consumers might well have preferred ATTM’s incentive-laden arbitration provision to the speculative ability to be part of a class action. That is because most disputes are individualized and thus could not be brought as class actions. Without the heavy subsidies for individual arbitration under ATTM’s provision—combined with the procedural flexibility and efficiency—“the typical consumer who has only a small damages claim” would be left “without any remedy but a court remedy, the costs and delays of which could eat up the value of an eventual small recovery.” *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995). Plaintiffs’ unconscionability rule would exalt the ability to pursue a class action over the ability to pursue individualized claims, which would be priced out of court.

Fifth, plaintiffs fail to grapple with the Washington Supreme Court’s decision in *Torgerson*, which confirms that individual arbitration under ATTM’s 2006 provision is not substantively unconscionable. *See* Opening Br. 38-39. In *Torgerson*, the court rejected the argument that a \$5,000 cap on damages for breach of contract is unconscionable under *Scott*, explaining that “\$5,000 ... [is] not so insignificant a sum as to foreclose legal action.” 210 P.3d at 323.

Under ATTM’s 2006 arbitration provision, plaintiffs can each potentially recover \$5,000, plus double attorneys’ fees, if ATTM offers less to settle their claims than the arbitrator ultimately awards. Accordingly, under *Torgerson*,

ATTM's provision does not run afoul of *Scott*. Indeed, any contrary holding would require interpreting state law in a manner that subjects arbitration provisions to special scrutiny, which is forbidden by Section 2 of the FAA, 9 U.S.C. § 2. *See Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 167 (5th Cir. 2004) (Section 2 preempts even “general principle[s] of contract law, such as unconscionability” if “those general doctrines” are “employ[ed] ... in ways that subject arbitration clauses to special scrutiny”); *see generally* Opening Br. 53-54.

Plaintiffs nevertheless attempt to distinguish *Torgerson* in two ways. First, they assert that, because *Torgerson* involved a negotiated contract between sophisticated parties, its holding does not apply to “terms in a consumer contract of adhesion.” Pl. Br. 60. But *Torgerson* deemed the buyers' sophistication to be relevant to procedural—not substantive—unconscionability. *See* 210 P.3d at 323 (buyers' “procedural unconscionability arguments must fail” because the buyers were “sophisticated real estate agents” who “took the opportunity to change their contracts to their advantage”). In fact, the court noted that “the principles of the unconscionability doctrine *remain the same*,” regardless of whether the transaction is labeled “as a real estate, *consumer*, or commercial deal.” *Id.* at 324 (emphasis added).

Second, plaintiffs assert that *Torgerson* applies only when both parties are equally affected by the challenged contract term. Pl. Br. 60-61. ATTM's 2006 arbitration provision, however, is fully mutual: ATTM, like its customers, is

required to arbitrate all disputes arising from its wireless service agreements. Moreover, as discussed above (at 22-23, *supra*), the bargain that the provision represents benefits the customer as well as ATTM because ATTM heavily subsidizes individual arbitration in exchange for the class waiver.

In sum, ATTM's 2006 arbitration provision does not "shock the conscience" and therefore is not substantively unconscionable under Washington law. Accordingly, the district court's ruling on this point should be reversed.

CONCLUSION

The Court should reverse the order of the district court.

Respectfully submitted,

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February 22, 2010

CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(A)(7)(C) AND CIRCUIT RULE 32-1 FOR CASE NUMBER 09-35563

I certify that:

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DATED: February 22, 2010

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 22nd day of February 2010, I electronically filed the foregoing brief with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I further certify that some of the participants in the case are not registered CM/ECF users. I have deposited the foregoing brief with a third party commercial carrier for delivery within 3 calendar days, to the following non-CM/ECF participants:

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